Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of the Northern Pacific Railway Company respectfully shows to this Honorable Court as follows:

Louise H. Adams, widow, and Frank H. Adams, son, of J. H. Adams, deceased, seek in this action to recover damages against the Northern Pacific

Railway Company for the death of J. H. Adams. The action was brought in the Circuit Court for the District of Washington, the jurisdiction of which court was based on diverse citizenship.

The trial resulted in a verdict for the plaintiffs below and judgment for $14,000 was entered on the verdict December 14, 1900 (Transcript, p. 80). Upon the pleadings and a bill of exceptions duly settled, the case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit, which court on May 19, 1902, affirmed the judgment.

The death occurred in the state of Idaho, and *though no statute of that state was pleaded or introduced in evidence,* it is sought to sustain the recovery by a statute of that state reading as follows:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The grounds of negligence relied on were two.

(a) That the defendant (this petitioner) having accepted the deceased as a passenger on its west bound train at Hope, in the state of Idaho, ran the train at so high a rate of speed around curves as to throw the deceased off a platform while he was passing from one car to another.

(b) That one of the cars in the train was provided with no vestibule, the remainder of the train being vestibuled, whereas it was alleged that the railway company had advertised the train as a vestibuled train.

The petitioner, besides denying negligence in either of the particulars alleged, set up a further defense that the deceased was, and for a long time had been, the attorney of various railway companies (but not of the petitioner) and was a *gratuitous* passenger, traveling on a free pass issued to him as such, endorsed on which was the following contract executed by him.

"CONDITIONS."

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

"JAY. H. ADAMS."

"This pass will not be honored unless signed in ink by the person for whom issued."

The trial court on motion and demurrer struck out the portion of the answer last referred to, holding that, while the contract on the pass made in the state of Washington where the action was brought

and where such contracts had been held binding (*Muldoon v. Seattle City Ry.*, 7 Wash. 528) might have bound the deceased as to any damages *he* might have sustained from personal injury, it could not bind his widow and son with respect to the damages *they* claim under the statute.

With respect to the alleged negligence of the railway company which is claimed to have been the cause of death, the essential facts are as follows:

The deceased had lived for many years in Spokane, state of Washington; had been a lawyer by profession and the attorney of several railway companies; in the trial of cases and in other work for these companies he had traveled much of his time on petitioner's railway, and on other railways in that section; he was very familiar with such travel.

On November 13, 1898, he, with a friend, went on a Northern Pacific train from Spokane to Hope, Idaho, about 85 miles distant, on the main line of the Northern Pacific road; after remaining several hours at Hope, they returned on the west bound overland train, which was about 3 hours late; deceased and his friend went into the train together. It is an established and uncontradicted fact that they got onto the train by one of the unvestibuled platforms (Transcript, pp. 98, 494). They went forward into the smoking car.

The train consisted of an engine and 8 cars, in the following order, viz., engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, standard Pullman sleeper (Transcript, p. 386).

All the cars in this train were vestibuled, except the one known as a "tourist sleeper," placed immediately in front of the dining car, which was not so equipped, but had open platforms like an ordinary passenger coach; that is, with hand-railings running along the end of the body of the car and end of the platform down to the steps and about 2½ or 3 feet high (Transcript, p. 86).

Shortly after leaving Hope, Mr. Adams rose from his seat in the smoking car, leaving his overcoat, and said he was going back to the dining car for some cigars (Transcript, p. 91). His friend never saw him afterwards. The testimony, however, shows, and it is not questioned, that Mr. Adams passed toward the rear end of the train, through the day coach and through the tourist sleeper, across the open platforms thereon and in to the dining car (Transcript, p. 481). After buying some cigars in that car Mr. Adams went forward; at this time the train was going at a fairly good speed over a track with many curves (Transcript, pp. 482-3) and Mr. Adams is shown to have had difficulty in keeping his balance in the aisles of the car (Transcript, pp. 481, 484). After this no one is shown to have seen him before his death. His body was found the next day opposite a curve in the railroad track and about 35 or 40 feet therefrom, at a point about 6½ miles west of Hope. His body when found was mutilated in a manner which indicated quite clearly that he had fallen from the train.

Your petitioner contends that the speed of the train was ordinary, such as was frequently and

customarily made over this portion of the road (Transcript, pp. [illegible]).

One of the grounds on which the jury was allowed by the charge of the trial court to render verdict against your petitioner was, the want of a vestibule on the car in question. Vestibules strengthen a car (Transcript, p. 546); are aids in preventing telescoping (Transcript, p. 561); they keep the cars warmer in winter (Transcript, p. 564) and make passage from one car to another more comfortable, protecting it from the elements and from cinders, sparks and dust. As one of the witnesses said, they would make crossing the platform safer for a child or decrepit person (Transcript, 601). The vestibule appliance makes a train more attractive in appearance and more comfortable. It is highly advertised, relieves some dangers and increases others (Transcript, pp. 616, 624). The vestibule is a comparatively new device, having been in more or less general use since 1892 (Transcript, p. 571). But the record shows that in 1898 the percentage of vestibuled passenger equipment on different prominent systems of the country was very small, and that generally unvestibuled cars were placed, when convenience or necessity, in almost all passenger trains.

On your petitioner's road one to three or more unvestibuled coaches had for many years been run daily and had been placed in the train just ahead of the dining car (Transcript, p. 382). It is undisputed that Mr. Adams had, for a number of years prior to his death, traveled a great deal on

the Northern Pacific road and other roads, and that probably every one of the Northern Pacific trains on which he had traveled had had one or more unvestibuled cars (Transcript, p. 653).

The record shows that the deceased boarded the train on an unvestibuled platform, and in going back to the dining car passed over two such platforms, one on each end of the tourist sleeper. This established the fact of his knowledge of their character, it being broad daylight, and consequently the court instructed the jury that he *must have known thereof* (Transcript, p. 820).

By the charge of the court the jury was allowed to find your petitioner negligent either (a) with respect to the speed of this train or (b) with respect to the unvestibuled character of the tourist car platform.

Your petitioner insists that the case should not have been allowed to go to the jury on either ground, and further, that because of the contract made between deceased and the railway company upon which he was being carried at the time, his heirs cannot maintain this action.

Your petitioner has no right of appeal or writ of error herein to this honorable court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship. The Circuit Court of Appeals stayed its mandate until the third Monday of October to give time for the presentation and determination of this petition. Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions in-

volved and a transcript of the record in the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court of appeals in this case, which was entitled in that court "Northern Pacific Railway Company, plaintiff in error, v. Louise H. Adams and Frank H. Adams, defendants in error," to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
Attorney.

BRIEF.

I.

Deceased was riding on a pass issued to him as a gratuity, and not upon any valuable consideration.

Endorsed upon this free ticket was a contract, *executed by the deceased,* reading

> "The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same."

The action cannot be maintained except upon the following statute of Idaho, which was not pleaded or introduced in evidence:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The pass was delivered to deceased in the state of Washington where he resided, and the contract

on the back of it must doubtless be regarded as having been entered into in that state, and must be governed as to its validity and effect by the law of that state.

The learned district judge before whom the case was tried did not hold that this contract was invalid. Without questioning its binding force he held (Transcript, pp. 41-44) that the contract of the *deceased* could have no effect upon a right secured by statute to his heirs. It was said that they sue, not in right of the deceased, but upon a statute which gives them a new and original right not derived from the deceased or dependent on his acts; that they were not parties to the contract and cannot be bound by it.

Throughout the trial every effort of the defendant to show the *status* of the deceased—his relation to the defendant, the measure of duty owing him by the defendant—was overruled, and the trial judge finally told the jury that they *were not to consider what duty the railway company owed to the deceased* (Transcript, p. 812).

The Court of Appeals affirms this view and also adds another, viz.: *that the pass contract cannot be construed as including personal injury resulting in death.* Because, as the court says in its opinion (Transcript, p. 877) (a) "A man's life is not his own to be disposed of by contract. A man may not barter away his life, or his freedom, or his substantial rights." * * * "The expressed permission by the deceased, therefore, that the railroad company might negligently take his life without conse-

quent liability would have been in violation of both the common and statute law, and a void contract." (b) The contract does not extend to "death" because it says "injury to the person," which the learned court says presumes a continuation of life (Transcript, pp. 877-8).

(A) Let us consider first the proposition that the statutory cause of action cannot be affected by any act or contract of the deceased. This view is certainly novel and the question is of such general importance as to warrant us in expecting that this court will order the record certified.

Lord Campbell's act gives a right of action for death "in case the wrongful act or neglect or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." This language or equivalent has been incorporated into the statutes of most of the states, but has been omitted, we believe, in the statutes of Connecticut, California, Georgia, Iowa, New Hampshire, Pennsylvania, Kentucky, Idaho, North Dakota and Washington.

The omission of this express condition is what the court below relies on in saying that it cannot be implied. The question is of importance in the ten states above mentioned. The general rule applied to our American statutes following Lord Campbell's act has been, that though varying in terms they are intended to accomplish the same result and are to be construed alike. In respect to damages for ex-

ample they vary widely. The California, Idaho and Washington statutes differ from most and say that a jury may give such damages as shall under all the circumstances of the case be just. Yet it has been held that in negligence cases they were to be confined like Lord Campbell's act, to pecuniary damages (*Munro v. Dredging Co.*, 84 Cal. 515, 527; *Klepsch v. Donald*, 4 Wash., 436, 444). Mr. Tiffany in his book "Death by Wrongful Act." sec. 63, calls attention to the fact that this condition has not been expressed in the statutes of several states and says that no case has been found in which it has not been implied.

No doubt the general rule of law (*The Stella* L. R. Probate Div. 1900, 161) and the general rule of justice is, that no action can be maintained by heirs or representatives where the deceased could not have sued. Judge Hanford in his opinion (Transcript, pp. 43-4) concedes this to be the rule where the suit is brought by the "representatives" of deceased, but denies it where the suit is brought by the "heirs." Now the statute of Idaho says the suit may be brought by "his heirs *or* personal representatives." *And whether brought by the one or the other the cause of action is the same* —founded on and created by the same statute. Is it not absurd to say, that if these plaintiffs had sued as "executors" their cause of action would have been of essentially a different nature from the cause of action in this case where they sue as "heirs?" The fact that the statute gives the right to sue to the "personal representatives" of the deceased, *or* to his

"heirs," is a plain implication that the action can be maintained only where the deceased might have recovered.

The defense here is that the deceased assumed the risks—that he was not a passenger—that as to him the defendant was not bound to exercise that *highest* degree of care which a common carrier owes to its passengers. The learned district judge was forced by the logic of his ruling into what seems to us a *reductio ad absurdum*, viz.: that the jury *could not consider what duty the railway company owed to deceased* (Transcript, p. 812).

The statute in question requires the act of defendant to be "wrongful." What is wrongful? Evidently legally wrongful. Consisting of facts which the law defines as a legal wrong—such as give rise to a legal liability. If the deceased assumed the risk, if he released the defendant from liability, if by valid contract he arranged for a different degree of care from that required by the common law, then the defendant's act may not have been "wrongful." The statute evidently means *wrongful as respects the deceased.*

The statute requires either wrongful act or *"neglect."* What is neglect? Evidently a lack of that degree of care of which the *deceased* was entitled to the benefit, under all the circumstances of the case, as *between him and the defendant.*

What follows from a different view? Certainly it follows that contributory negligence of the deceased would be no defense; nor would it be a defense that he was a fellow servant with him by

whose negligence he was injured; nor would it exempt the defendant that he had as a servant, or otherwise, assumed risks, and was injured by one of the risks assumed. It follows also from the view of the lower court that deceased could have given no release had he survived, and also that had he survived, sued and recovered damages for his injury and then died, his recovery would have been no bar to this action.

But contributory negligence has been held a good defense even under statutes like the one in question not containing the express condition of Lord Campbell's act above quoted (*Quinn v. N. Y. N. H. & H. R. R. Co.*, 56 Conn. 44; *Lane Adm'r v. Cent. Iowa R. R. Co.*, 69 Iowa, 443; cases cited in note to sec. 66 Tiffany).

The Circuit Court of Appeals cites in support of its conclusion *Munro v. Dredging Co.*, 84 Cal., 515, and *Chesapeake & Ohio R. R. v. Dixon*, 179 U. S., 131. In the first case the question was simply whether the damages were part of the estate of deceased subject to his debts. It was held they were *not*, which is according to the general rule under all the statutes. No question touching or relating to the one here raised was involved in the case cited from 179 U. S. Neither decision touches the matter in hand in the remotest degree.

(B) The Circuit Court of Appeals says that a contract modifying the ordinary liability *"for any injury to the person"* does not cover injuries to the person resulting in death. But certainly "any in-

jury to the person" means all injuries regardless of result. The deceased died from an injury to the person which was within the terms of this contract.

And suppose we admit, that the deceased was not contracting and could not contract with respect to the statutory right of action given his representatives or heirs by statute, we are still thrown back on the question first discussed, viz: whether the statute gives any action where the deceased could not have maintained one.

The court further says that "A man cannot barter away his life, his freedom or his substantial rights." This is a mere glittering generality and radically unsound if taken broadly and literally. As applied by the court it is in conflict with the decision of this court in *Baltimore & Ohio R. R. Co. v. Voigt*, 176 U. S., 498. And if granted the question still remains, whether the statute gives any right to maintain an action for death where the deceased could not have recovered had he survived.

(C) That the contract of the deceased was binding on him—that a man may lawfully contract with a carrier to ride on its trains at his own risk—is well settled by the authorities. In the case of Voigt above cited, p. 513, the distinction was drawn between cases like *Railroad Co. v. Lockwood*, 17 Wall., 357, where the dispensation from liability for injuries was made a condition of transportation which the passenger had a right to demand and which the carrier was under a legal duty to furnish, and cases where one is on a train not by virtue of

any *right* but solely because of and under a special contract entered into as a condition of the carriage.

This case is like the Voigt case. The deceased for a valuable consideration, without compulsion, by fair contract well understood and signed by him, assumed the risk of traveling, agreed that as to him the company was not bound for the neglect of its servants, as a carrier is bound. Gratuitous carriage was a valuable consideration for the agreement. In the case of Voigt this court cites with approval many decisions holding such contracts valid. And these cases are a sufficient answer to the position of the court below that a man cannot barter away his life, freedom or substantial rights. The doctrine is analagous to the rule which holds it competent for an employe to assume the risks of the service including the negligence of fellow servants.

The contract was made in the state of Washington and made in view of the decisions of the highest court in that state holding it valid (*Muldoon v. Seattle City Ry. Co.*, 7 Wash., 528, s. c. 10 Wash., 311). Neither of the lower courts holds that the contract is other than binding on the *deceased* and the point really comes down to this—whether the plaintiffs can sue although the deceased could not.

The case of *Clark v. Geer*, 86 Fed. Rep., 447, cited by the Circuit Court of Appeals is not in point. That case involved the question, whether a certain contract *limiting the damages to be claimed by the deceased* in case of personal injury could be construed to *fix the damages* to be recovered for his death.

II.

The case was submitted to the jury with the instruction that they might find the company negligent in either one of two particulars: (a) with respect of the speed of the train; (b) with respect of its equipment—that is, because one car in the train, the tourist sleeper, was not vestibuled.

The general facts in regard to the arrangement and equipment of the cars are sufficiently stated in the petition for certiorari herewith filed, and we think need not be repeated. The Circuit Court of Appeals in its opinion falls into some errors of fact. At p. 874 Transcript, that court says: "The tourist sleeper was not only not vestibuled, but had no device whatever for enclosing its platforms or guarding persons who might be upon the same." The record shows that the open platform car was provided with those safeguards in customary use on such cars—that is, hand railings running along the end of the body of the car and the end of the platform down to the steps and about two or three feet above the floor (Transcript, p. 86). The court again says on the same page that the deceased with his friend boarded the train at either the rear end of the smoking car or the front platform of the adjoining first class coach, and proceeded immediately forward into the smoking car, where they took their seats. The evidence shows that they entered the train by one of the unvestibuled platforms

which *must* have been at one end or the other of the *tourist* car (Transcript, p. 494). The trial court instructed the jury that this was true, and that therefore the deceased must be taken to have known the unvestibuled condition of that car (Transcript, p. 820). The court says (Transcript, p. 881) that the ordinary schedule running time between these stations (Hope and Sand Point) was thirty-five minutes. This is an error. The court probably refers to a certain time card introduced in evidence and in force at the date of the accident which showed thirty-five minutes. But this statement is misleading. The "ordinary" time was much faster. Time card summer 1896, twenty-five minutes (Transcript, p. 327). Many other cards twenty-five, twenty-seven, twenty-eight minutes (Transcript, p. 349). The engineer of this train had made the run as fast as nineteen minutes (Transcript, p. 328) and often in 21 minutes (Transcript, p. 328) and with no unusual lurch (Transcript, p. 328). He had run over the same curve where deceased is supposed to have been thrown off more than three hundred times at a faster rate (Transcript, p. 361). On this day he was making just about usual time (Transcript, p. 357).

It is impossible to have a straight track through a mountain country and there is no pretense that the track was improperly or negligently located or built. There is no pretense that any accident happened to this train or had ever happened to any other train. There is no pretense that it was pos-

sible for the company to have built a straight track through the country in question. The best evidence that the track was properly built and the train properly run is that the trip was made in safety. No passenger suffered any injury except the deceased.

With respect to the *speed of the train* the verdict rests on the most slimsy foundation and cannot be sustained, unless it is to be held that trains must be run according to the varying ideas of a thousand juries.

So far as the *unvestibuled character of the tourist sleeper* is concerned the facts are also briefly but sufficiently stated in the petition for certiorari. They cannot, we think, be distinguished from the facts involved in *Sansom v. Southern Ry. Co.*, Circuit Court of Appeals, 6th Cir., 111 Fed. Rep., 887. In that case the decision was directly the reverse of that in the case at bar. This is, as we understand it, sufficient ground for granting the writ under the ordinary practice of this court. The Sansom case was cited to the Circuit Court of Appeals in this case, but is not referred to in the court's opinion.

As the court well said in the Sansom case, if the deceased had been assured by the advertisements of the railway company that this was a completely vestibuled train, and if he relied on such statement and was injured by his reliance thereon, he might perhaps recover. But in the case at bar, not only was the train a daylight train as in the Sansom case and the want of the vestibule plainly visible,

but it was affirmatively proved and charged by the trial court that the deceased had passed over the unverifiable platforms at least twice and must be conclusively presumed to have known their condition.

III.

As before stated, the deceased knew of the unverifiable condition of the two platforms on the tourist sleeper, and the trial court told the jury that they must regard him as having had such knowledge. On the plainest and best settled principles, having such knowledge, he was bound in attempting to cross the platforms to act with reference thereto, and he must be held to have assumed the risk incident to the unverifiable character of the platforms; notwithstanding which the trial court submitted it to the jury to find that the company was negligent with respect to the construction of these platforms; and the Circuit Court of Appeals so far failed to apprehend the defendant's position as to say (Transcript, p. 8[illegible]) our claim was that he was guilty of contributory negligence in passing over the platforms. No such proposition was made in the court below or will be asserted here. Whatever may be said of the speed of the train, so far as the unverifiable condition of the platforms is concerned the case is plain one of risk assumed by the deceased. It cannot be known upon which point the verdict was based.

Doubtless both the lower courts were led into treating this as a fact of no account because of their view on the first question discussed. Indeed if it is true that any contract or act of the deceased could not bar this action by his heirs, and if, as the trial court charged, the jury could not consider what duty the railway company owed to the deceased, this action might be maintained although the damage occurred from risk assumed by the deceased. This was clearly the theory on which this case was tried. It is a striking and startling illustration of the error which we have endeavored to make plain under the first head of this brief. Supposing the deceased had been an employe and had been killed by one of the ordinary risks of the employment—by the negligence of fellow servants, for example, or by some imperfect tool or appliance the imperfection of which was fully known to him—could his heirs or representatives recover? To assert that they could is a proposition, to say the least of it, so novel, so important and so contrary to general rules, as to bring the case within the category of those which this court will order certified from the Circuit Court of Appeals.

IV.

Finally, it should be understood that the verdict is based on pure speculation with respect to the corpus of this matter—the cause of death. No one assumes to testify how or why the deceased came to fall from the train. We do not know whether

he was seized with a sudden fit of illness, whether he stubbed his toe and fell down, whether he was using to the best of his ability the hand railings which were on both sides of the platform, whether the case is one of suicide, or carelessness. We deem it unnecessary to more than suggest these questions at this stage of the case, but if the record is certified we shall insist that a verdict cannot be rendered as this one was, based upon guess-work and speculation as to the essential and central fact involved.

We beg to remind the court, in conclusion, that the mandate of the Circuit Court of Appeals has been stayed only until the third Monday in October, and we trust that an announcement will be made on this petition on or before that day.

C. W. BUNN,
Of Counsel for Petitioner.